

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 18, 2007 Session

STATE OF TENNESSEE v. DARYL S. HOOPER & SHAWN A. STUMP

Appeal from the Circuit Court for Humphreys County
Nos. 10902-A, -D Robert E. Burch, Judge

No. M2007-00094-CCA-R3-CD - Filed June 24, 2008

In August 2006, after a joint trial, a Humphreys County jury convicted defendant Daryl Hooper of one count of kidnapping, a Class C felony, one count of facilitation of aggravated burglary, a Class D felony, and one count of theft of property less than \$500, a Class A misdemeanor. The jury convicted defendant Shawn Stump of one count of kidnapping, one count of facilitation of aggravated burglary, and one count of assault, a Class A misdemeanor. The trial court sentenced Hooper to eight years in the Department of Correction as a Range II, multiple offender, and Stump was sentenced to a term of four years as a Range I, standard offender. On appeal, both defendants seek relief on the same five grounds: (1) the evidence produced at trial was insufficient to support their convictions; (2) the trial court erred in instructing the jury that Hooper was not a legal surety; (3) the trial court erred in instructing the jury on the definition of “knowingly”; (4) the trial court erred in instructing the jury on the definition of “recklessly”; and (5) the trial court erred by imposing excessive sentences and denying alternative sentencing. After reviewing the record, we conclude that the trial court erred in giving an improper jury instruction as to Hooper’s status as a legal surety, and that the court erred in giving an improper definition of “knowing” during jury instructions. We further conclude that these errors were reversible errors as to the defendants’ convictions for kidnapping and facilitation of aggravated burglary but harmless as to Hooper’s theft conviction and Stump’s assault conviction. Accordingly, the judgments of the trial court are affirmed in part and reversed in part, and the cases are remanded for new trials on the defendants’ felony offenses.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part
and Reversed in Part; Cases Remanded for New Trials**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ALAN E. GLENN, JJ., joined.

Michael J. Flanagan, Nashville, Tennessee (on appeal); Lee Ofman, Franklin, Tennessee (at trial), for appellant Daryl S. Hooper.

William B. “Jake” Lockert, III, District Public Defender; Haylee Bradley-Maples, Assistant District Public Defender (on appeal); Lee Ofman, Franklin, Tennessee (at trial), for appellant Shawn A. Stump.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; Lisa Donegan, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At trial, Jeffrey Turner testified that in December 2003, he received a citation in Humphreys County for driving on a suspended license. Over the next several months, Turner moved back and forth between Tennessee and Florida for work, but he made most of his court appearances. Turner admitted that at one point, however, he missed a date and was arrested in August 2004 for failing to appear. Turner contacted ASAP Bonding Company, who arranged for Turner’s release on bond. Turner testified that defendant Hooper, his employer at the time, also signed the bond. Turner said that he quit working for Hooper in late August or early September 2004.

Turner testified that on the evening of November 26, 2004, he and his girlfriend, Joy Bland, were in the bedroom of their friend Kim Rochelle’s house in McEwen, Humphreys County. Some time between 10:00 and 10:30 p.m., Turner heard some loud knocking on the front door. Turner also heard a man, whose voice he recognized as Stump’s, saying that he (Stump) represented ASAP Bonding and that Turner needed to come outside. Turner testified that although the knocking went on for a few minutes, he did not answer the door because he did not believe that anyone with the bonding company was looking for him. Turner then heard someone entering the residence through the kitchen door and then heard someone tearing down the partition between the kitchen and the bedroom in which he and Bland were located. Turner then saw Stump and another man, later identified as Dewayne Pirtle, enter the bedroom, with Pirtle pointing a gun at Turner and Bland. Stump told Turner that he needed to come with the two men. Turner testified that he waited for one of the two men to show a badge or a warrant, but neither Stump nor Pirtle did so. Turner asked the men why they were in the residence and where was their warrant. According to Turner, one of the men replied that they represented ASAP Bonding, they did not need a warrant, and that “the law was right up the road.” Stump then handcuffed Turner and led him outside the residence.

Once Turner was outside the house, he saw Hooper, who said that he would be taking Turner to jail for jumping bail, although Turner had not missed any court dates since his August 2004 arrest. Before leaving the house, Turner observed a 12-gauge shotgun near the front door of the residence. While outside the house, Turner observed Hooper exit the house with the shotgun, which Hooper said “ought to be a payment.” Turner saw Hooper walk to the rear of his car, a white sedan, with the gun, though he did not see Hooper place the gun in the trunk. At that point, Hooper, Stump, and Pirtle put Turner into the car, being driven by Susan Pirtle, and Turner was then taken to the Humphreys County jail.

Turner testified that Hooper and Stump led him into the jail and then left almost immediately. Turner gave a statement to police, who removed Turner's handcuffs and later released him without arresting him or issuing a citation. Turner said that Miram Lawson, the ASAP Bonding representative who had completed Turner's bond, later arrived and provided the police with additional information. Turner said that prior to these events, he knew Hooper and Stump, and he did not believe that they were bail agents or had any connection with ASAP Bonding.

On cross-examination, Turner said that he worked for Hooper between July 23 and August 26, 2004. Turner admitted that in addition to failing to appear for his May 12, 2004 court date, he was also charged with misdemeanor possession of marijuana when he was arrested in August 2004. Turner was shown copies of two bonds which he signed following his arrest. One was a bond for \$1000 on the simple possession offense, and another was \$3500 for simple possession and failing to appear. Turner said he was unaware why two bonds were made.

Turner admitted that both ASAP Bonding and Hooper signed the bond, and that both were listed as sureties. Turner admitted that the bonds stated that he was not to leave Humphreys County without permission from his sureties. Turner said that he notified ASAP Bonding each time he left Humphreys County for Florida, but that he did not notify Hooper. He also reiterated that despite going back and forth between Florida and Tennessee for work, he did not miss any of his scheduled court dates after being arrested for failing to appear. Turner said that he owed Hooper money for making the bond, and that he also owed Hooper's father some money.

Turner testified that before Stump and Pirtle arrived at Rochelle's residence, Bland told him that Stump had been by the house earlier in the day looking for Turner. Turner said that he was aware that Hooper was "looking for his money," which Turner assumed was the \$600 he had borrowed from Hooper's father. Turner said that Hooper had taken some of the money out of Turner's check while Turner still worked for Hooper, but that he had not paid back most of the money.

Turner admitted that when Stump and Pirtle were leading him outside the house, one of the men said that they were getting off Turner's bond. He also admitted that he resisted being handcuffed and resisted being placed inside Susan Pirtle's car, and that this resisting caused his bruises. Turner said that he was not kicked or thrown to the ground while handcuffed, despite his earlier statement to police, which indicated that he had been beaten.

On redirect examination, Turner said that he had two or three scheduled court dates between his August arrest and the incident leading to these proceedings, and that he had made all of his appearances. Turner said that his borrowing money from Hooper's father and from Stump had nothing to do with his bond.

Joy Bland Turner testified that she was the victim's girlfriend at the time of this incident, and that she had married the victim since that time. Mrs. Turner said that she was aware that Hooper had co-signed her husband's bond following his arrest, but she knew nothing about the particulars of the

bond. She testified that she was present with Mr. Turner when he made his court dates following his arrest, and that he had missed no scheduled appearances between the date of the arrest and the date of the incident leading to this case.

Mrs. Turner testified that on November 26, 2004, she was with her then-boyfriend at Kim Rochelle's house. Around 9:45 p.m., she heard a knock at the front door. She said that the knocking went on for five to ten minutes before the partition or folding door between the kitchen and bedroom was torn down and Stump and Dewayne Pirtle entered the bedroom. She testified that Pirtle pointed a gun in their faces, while one of the men said that they represented ASAP Bonding and that Jeff Turner would have to come with the two men. Mrs. Turner said that Stump then handcuffed Mr. Turner, who struggled as he was being handcuffed. Stump and Pirtle then led Mr. Turner outside, after which Pirtle returned to the bedroom and explained to Mrs. Turner that they were taking Mr. Turner to jail, and that she could follow them to jail. Mrs. Turner then went outside, where she witnessed Mr. Turner struggling as he was being placed in the back of Susan Pirtle's car. She also observed Hooper standing at the rear of the vehicle, its trunk lid open, holding a shotgun.

On cross-examination, Mrs. Turner admitted that at the preliminary hearing, she had testified that she did not recall the events of November 26. She recalled that the night of the incident, she did not hear anyone outside the residence calling for Mr. Turner to come outside. She said that Mr. Turner had notified the bonding company and the district attorney each time he left Humphreys County for Florida, but he did not notify Hooper.

Mrs. Turner said that a few hours before her husband was taken from the Rochelle house, Stump came by the residence. She said that Stump initially asked if Kim Rochelle was home. Mrs. Turner said that Rochelle was not home. Stump then asked her where Mr. Turner was. She replied that he had gone out to get something to eat. According to Mrs. Turner, Stump told her that Mr. Turner owed Stump money, and that Stump "might have said" something about Hooper's looking for Mr. Turner so that Hooper could get off the bond. She later told Mr. Turner that Stump had been by the home, but she did not convey the content of her conversation with Stump. Mrs. Turner said that she did not believe that the defendants worked for ASAP Bonding, though she did know that Hooper's name appeared on her husband's bond.

On redirect, Mrs. Turner testified that she later learned that a shotgun which she had seen near the front door of Rochelle's residence was missing after the incident. She also testified that when she saw Stump and Pirtle in the bedroom, with Pirtle pointing a gun at her and Mr. Turner, she was "afraid for what they were going to do with that gun." During the episode, she asked Pirtle and Stump where the police were located, and she was told that the police "were sitting up the road in case they needed them." Mrs. Turner said that shortly after the incident, Rochelle returned home. Rochelle told her that the police were in fact at a church near the residence. However, Mrs. Turner said that she passed the church on the way to the police station, and by this time the police had left the church parking lot.

Kim Rochelle testified that hers was the residence at which Mr. and Mrs. Turner were staying

the night of November 26, 2004. Rochelle said that she returned home that evening to discover an unfamiliar white car pulling out of her driveway. She also saw Dewayne Pirtle talking to Mrs. Turner, who told Rochelle about that evening's incidents. She testified that she gave nobody other than Mr. and Mrs. Turner permission to enter her home that evening.

Rochelle testified that earlier in the day, a friend of her boyfriend, David Dabbs, returned a shotgun that he had borrowed from Dabbs. Rochelle told this person to put the gun inside the house beside the front door. Rochelle said that she had not moved the gun prior to leaving the house that evening, and that the gun was missing when she inspected her home following the incident. On cross-examination, Rochelle testified that she did not know for sure whether Hooper had entered her home.

Debbie Armstrong, Dabbs's mother, testified that she purchased a 12-gauge Remington shotgun and gave it to her son. She said that the shotgun was still registered in her name when it was taken from Rochelle's residence. Armstrong testified that the gun was valued at approximately \$250.

Danielle Smith, a jailer at the Humphreys County Jail, testified that in November 2004, while working her 6:00 p.m. to 2:00 a.m. shift at the jail, the defendants came to the jail and Hooper asked her about the procedure to be removed from someone's bond. Smith said that she then asked Hooper how the individual had been bonded out; when Hooper replied that he had gone through a bonding company, she replied that Hooper would have to contact the bonding company to complete the process of being removed from the bond. Smith said that another jailer, Kevin Duke, was present during this time, and that Duke made a phone call to someone, but Smith did not know to whom Duke spoke. Smith said that later that evening, the defendants returned to the jail with another man, who Smith later learned was the victim in this case. A few hours after that, she again saw the defendants at the jail following their arrest.

On cross-examination, Smith said that she did not ask Hooper the name of the person for whom he had made the bond, and that she did not look up Turner's bond, though she could have done so. She denied telling Hooper and Stump to find Turner. She admitted that Duke had contacted a sheriff's deputy, and that she gave the defendants the advice which she gave them after she spoke to Duke. Smith said that the night of this incident, she was relatively new at her job and did not know how to handle this situation.

Kevin Duke testified that on November 26, 2004, he was employed as a jailer with the Humphreys County Sheriff's Department. Duke recalled that while he was at work one evening, the defendants arrived and asked Smith what steps they needed to take about being removed from a person's bond. Duke said that he was "in the back" and did not speak to the defendants. He did say that he later called a sheriff's deputy, whose name he did not recall, for his own information. Duke said that later that evening, the defendants returned to the jail with Turner. One of the men said "he's your problem now," left Turner with the jailers, then left the building. On cross-examination, Duke said that he did not look up information on Turner's bond. He admitted that in February 2006,

he made a written recollection of that evening's events. In that writing, he admitted that he spoke to Turner that evening, and Turner had said that two men had entered his house, dragged him from the house, and forced him into their car at gunpoint, while his wife and children stood by screaming and crying. On redirect examination, Duke said that he had not been interviewed by law enforcement in connection with this case prior to making this written statement.

Deputy Jeremy Ethridge with the Humphreys County Sheriff's Department testified that on the night of November 26, 2004, he was working the 6:00 p.m. to 2:00 a.m. shift, riding along with Deputy Maples, when he received a call from dispatch. Deputy Ethridge testified that the call mentioned something about "a guy at the jail [who] wanted to speak to an officer" and requested that he and Deputy Maples contact the jail. Deputy Ethridge contacted the jail, and he was connected with Hooper, who said that "he was a co-signed on a bond and wanted to know if he could go get the guy to go off the bond." Deputy Ethridge testified that he later told Hooper unequivocally that he could not "get" the person by himself; rather, a representative from the bonding company would have to go with him.

On cross-examination, Deputy Ethridge said that he had "just started" working for the sheriff's office the night of this incident. He said that initially, he was unsure as to what answer to give Hooper. He also admitted that he was unclear as to the particular nature of this bond or what was entailed with being a surety on a bond. He also said that he was unfamiliar with that section of the Tennessee Code Annotated that addressed bail bonds, particularly the section which states that a citizen on a bail bond who has a certified copy of the bond "can ask a sheriff's deputy to . . . come with him to arrest someone so that they could bring [the person] in." Deputy Ethridge said that he developed his answer to Hooper's question after Deputy Maples contacted the Humphreys County Sheriff and Deputy Maples relayed the sheriff's response to him. Deputy Ethridge said that he did not speak to Officer Binkley with the McEwen Police Department about the situation, and that Hooper did not tell him that the bonding company had informed or authorized him (Hooper) to pick up Turner. On redirect examination, Deputy Ethridge testified that Hooper did not say that he had a certified copy of the bond in his possession.

Deputy Joseph Maples with the Humphreys County Sheriff's Department testified that he was riding along with Deputy Ethridge when dispatch contacted them about Hooper's question. After Deputy Ethridge and Hooper spoke for a while, Deputy Maples contacted the sheriff, who said that Hooper could not pick up Turner himself and that picking up Turner was the bonding company's responsibility. Deputy Maples testified that nobody told him that Hooper had a certified copy of the bond with him, and nobody told Hooper that he could pick up Turner by himself. On cross-examination, he testified that he did see Officer Binkley that evening, but he did not tell the officer about the situation because Officer Binkley worked for the McEwen Police Department and therefore "it wouldn't have been relevant for me to even ask him anything."

Humphreys County Sheriff Ronnie Tounette testified that on the evening of November 26, 2004, he received a telephone call from Deputy Maples, who explained Hooper's question concerning Turner's bond. Sheriff Tounette told Deputy Maples to tell Hooper that because Hooper

had co-signed a bond with a professional bonding company, if Hooper had a problem with the bond, he needed to address those problems with the bonding company. Sheriff Toungette testified that nobody told him that Hooper had been told by the bonding company to apprehend Turner, and the sheriff was not told that Hooper had a certified copy of the bond with him.

On cross-examination, Sheriff Toungette explained his understanding of corporate bonds and property bonds as follows:

You've got a professional bonding company which we call corporate bonds; and then you've got other type bonds which can be signed by private individuals where they sign what we call a property bond. Now the way I see it, the way I've understood it and the way I've always practiced, if a professional bonding company or one of [its] employees comes in and has got just reason to go off of a person's bond; and they want to surrender that person, we'll accept that person in jail; and then we expect them to go see that judge as soon as they can see that judge.

Now if a private individual has been allowed to put up their property on what we call a property bond, there's no professional company involved, it's a private individual want[ing] to put up [his] property on a property bond as a surety; and they have just reason to surrender somebody, we'll do the same thing. We'll accept that person but I expect that private citizen that's been on that property bond to go see that judge also. So I see it as two different [scenarios]

Thus, while the sheriff admitted that both ASAP Bonding and Hooper were listed as sureties on Turner's bond, he considered ASAP, the professional bonding company, to be the surety, rather than Hooper, the co-signer.

Deputy Keith Binkley with the Humphreys County Sheriff's Department testified that on November 26, 2004, he was employed with the McEwen Police Department. Between 9:00 and 10:00 that evening, while sitting in his patrol car in the parking lot of a local Pentecostal church, he was approached by a white car driven by Susan Pirtle. Hooper, a passenger in the car, informed Deputy Binkley that he would be going "down the road to get a gentleman," and that Hooper would be going off this person's bond. Hooper asked Deputy Binkley to accompany him, which the deputy refused to do because "I had no reason to go down there. The gentleman had done nothing illegal. He had no warrants, no capias. There was no legal reason for me to go." Deputy Binkley testified that prior to his encounter with Hooper, he had already learned of the defendants' plans based on his conversations with Humphreys County Sheriff's Deputies Maples and Ethridge.

Deputy Binkley testified that Hooper did not tell him that he (Hooper) was listed as a surety on Turner's bond, and Hooper did not tell the deputy that he had received permission to apprehend Turner. Hooper also did not indicate to Deputy Binkley that he had a certified copy of the bond.

Deputy Binkley testified that when he arrived at the Humphreys County Jail later that

evening, Turner was talking to a judicial commissioner, who the deputy explained was someone who “writes our warrants based upon our testimony and a regular citizen’s testimony.” Deputy Binkley said that he later spoke to the commissioner, and arrest warrants for the defendants were subsequently issued. On cross-examination, Deputy Binkley testified that he was listed as the affiant on the warrants, even though he had not personally observed the incident at Kim Rochelle’s residence. The deputy said that the reason he, as opposed to Mr. or Mrs. Turner, was listed as the affiant was because the judicial commissioner would not issue an arrest warrant in a felony case based on the statement of a citizen affiant. The deputy also admitted that at the preliminary hearing, he had testified that Hooper, when the two men spoke the night of the incident, told him that a certain J.T. Damesworth had informed him (Hooper) that he could bring in Turner by any means necessary. Deputy Binkley said he did not stop Hooper from driving away after their conversation because he did not know what Hooper’s intentions were.

On redirect, Deputy Binkley said that the process used to swear out the arrest warrant in this case, whereby a citizen would relay information to a police officer, who would then swear an affidavit to a judicial commissioner, was common practice. The deputy also said that before his conversation with Hooper, he had overheard Deputy Ethridge’s telephone call with Hooper, in which Deputy Ethridge relayed Sheriff Toungette’s instruction that Hooper could not apprehend Turner by himself.

Miram Lawson testified that when the events which led to this case occurred, she was employed as certified bond agent with ASAP Bonding. She recalled that she signed two bonds for Turner on behalf of ASAP bonding, with Hooper signing as another surety on each bond. She noted that two bonds were completed, one noting that Turner was charged with driving on a revoked license, the other noting that he was charged with that crime and simple possession. However, she said that only the bond listing both offenses was submitted to the court.

Lawson testified that between the date on which Turner’s bond was made, August 10, 2004, and the date of this incident, Turner was scheduled to appear in court three times, and that Turner attended court each time. Lawson said that Turner had informed her that he was headed back and forth between Florida and Tennessee for work. Lawson further testified that she did not authorize anyone to pick up Turner while he was on bond. On cross-examination, Lawson testified that the second bond had been made after the simple possession charge had been added, and it was a common practice for ASAP to change the bond if a mistake had been made with an earlier bond.

Paula Miller, testifying for the defendant, said that in November 2004, she was employed as a jailer with the Humphreys County Sheriff’s Department. She initially testified that she did not tell Susan Pirtle or Pirtle’s father about the sheriff’s policy for removing someone from a person’s bond. She later said that at the preliminary hearing, she had testified that she told Pirtle that normally, the person wishing to be removed from bond would have to bring the individual to jail and then go in front of a judge, who would remove the person from the bond. Miller clarified her testimony, stating, “I didn’t say go out and bring somebody in. I said, usually a person will bring somebody in but the judge is the only one that can release them from the bond.”

Jennifer Eleazer, an employee of the Dickson County Sheriff's Department, testified that on November 26, 2004, she worked as a 911 dispatcher. Eleazer said that on that evening, she and Deputy Binkley (who was then employed with the McEwen Police Department) were sitting in Deputy Binkley's police vehicle in the parking lot of a church in McEwen when Susan Pirtle's car pulled up to the police car. Hooper, a passenger in Pirtle's car, explained to them that he wanted to come off Turner's bond, and he asked Deputy Binkley to assist him in picking up Turner. According to Eleazer, the deputy told Hooper that because the bond had been entered into by a professional bonding company, a representative of the bonding company would have to accompany Hooper if Hooper wished to apprehend Turner. Eleazer admitted that during a preliminary hearing, she had testified that Deputy Binkley refused to accompany Hooper to the residence because of liability reasons, though Hooper could call police for assistance "if it turn[ed] into a criminal matter."

After hearing the above proof, the jury found both defendants guilty of kidnapping as charged in the presentment. The defendants, who were charged with aggravated burglary, were acquitted of that charge but were convicted of the lesser included offense of facilitation of aggravated burglary. Hooper was convicted of theft as charged in the presentment, and Stump, who was charged with aggravated assault, was convicted of the lesser included offense of assault. This appeal follows.

ANALYSIS

I: Sufficiency of Evidence

The defendants first argue that the evidence produced at trial was insufficient to support any of their convictions. For the reasons stated below, we conclude that the evidence was sufficient to affirm the jury's verdicts and therefore deny the defendants relief on this issue.

An appellate court's standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in original). The appellate court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

Common Offenses

Both defendants were convicted of kidnapping and facilitation of aggravated burglary. Pursuant to Tennessee's criminal code, one is guilty of kidnapping when that person "knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty" and the offense is committed "[u]nder circumstances exposing the other person to substantial risk of bodily injury." Tenn. Code Ann. §§ 39-13-302(a), -303(a)(1) (2003). "A person commits [aggravated] burglary who, without the effective consent of the property owner," enters a habitation "with intent to commit a felony or theft." Tenn. Code Ann. §§ 39-14-401, -402(a)(1), -403 (2003). A person commits facilitation of a felony when, "knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under [Tenn. Code Ann.] § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony." Id. § 39-11-403(a). The code defines "knowing" as follows:

"Knowing" refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

Id. § 39-11-302(b).

The defendants' main argument concerning the sufficiency of the evidence as to these offenses is that the defendants did not possess the requisite culpable mental state to commit the offenses. The defendants' argument is based on "the[ir] assumption that [they] had a legal right to take Turner to the Humphreys County Jail." In support of their argument, the defendants cite to Tennessee Code Annotated section 40-11-133(a), which states that a "bail bondsman or surety may arrest the defendant on a certified copy of the undertaking, at any place . . . or may, by written authority endorsed on the certified copy, authorize another person to make the arrest." The defendants argue that because Hooper was listed on Turner's bond as a legal surety, the defendants had the authority to apprehend Turner, and therefore their entry into Rochelle's residence and subsequent apprehension of Turner were therefore not "unlawful."

The defendants' arguments fail on several grounds. First, the Bail Reform Act only permits a bondsman or surety to apprehend a defendant for "good cause," such as a breach of the bond contract, good cause to believe the defendant will fail to appear, forfeiture on the bond, or actual failure to appear in court. See id. § 40-11-132(1)-(5). In this case, both Turner and Miram Lawson, the bondsman who signed Turner's bond on behalf of ASAP, testified that Turner appeared in court for all three of his scheduled hearings between the entry of the bond in August 2004 and these events, which occurred in November 2004, despite the fact that Turner was moving back and forth between Tennessee and Florida for work. Thus, the defendants could not have had good cause for arresting Turner under the Bail Reform Act. Furthermore, the act requires that a surety or third party authorized by the surety who seeks to arrest a defendant pursuant to its provisions present a certified

copy of the bond. None of the law enforcement officials who testified in this case testified that they were presented with a certified copy of the bond. In light of this evidence, the jury properly rejected the defendants' theory that they had the legal authority to enter the Rochelle residence and apprehend Turner.

In light of this conclusion, we now examine the evidence relevant to the kidnapping and facilitation of aggravated burglary offenses. The evidence indicates that Hooper, Stump, and Susan and Dewayne Pirtle went to Kim Rochelle's residence with the intent to apprehend Jeffrey Turner and bring him to the Humphreys County Jail. While Hooper waited outside, Stump and Dewayne Pirtle broke into Rochelle's residence, Pirtle pointed a gun at Turner, Stump placed Turner in handcuffs, and the two men removed Turner from the residence. Once Turner was outside, Hooper joined Stump and Pirtle in placing Turner in Susan Pirtle's automobile. Turner was then transported to the Humphreys County Jail. This evidence was sufficient for the jury to convict the defendants of kidnapping and facilitation of aggravated burglary.

Assault (Committed by Stump)

Stump was also convicted of assault against Joy Bland Turner. As relevant to this case, a person commits assault who "[i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury." Tenn. Code Ann. § 39-13-101(2) (2003). In this case, the evidence shows that Pirtle, who broke into the residence along with Stump, pointed a pistol at Mr. and Mrs. Turner, and Mrs. Turner testified that she felt afraid after Pirtle pointed the gun at her. The evidence was sufficient to establish the elements of the offense beyond a reasonable doubt. Furthermore, we note that while on appeal Stump states that the evidence was insufficient to support his assault conviction, he has provided no argument or references to the record to support this assertion. Accordingly, we affirm Stump's assault conviction.

Theft (Committed by Hooper)

Hooper was also convicted of theft of property in connection with his taking a shotgun from the Rochelle residence. Pursuant to our criminal code, "[a] person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." Tenn. Code Ann. § 39-14-103 (2003). The evidence produced at trial reflects that Hooper entered Rochelle's home, removed a shotgun valued at \$250, and declared that it would serve as "payment." Hooper was also seen holding the gun near the open trunk of Susan Pirtle's car. This evidence was sufficient to establish the elements of the offense beyond a reasonable doubt, and, as with Stump's assault conviction, while Hooper asserts that the evidence was insufficient to support his theft conviction, on appeal he has provided no argument or references to the record to support his assertion. As such, we affirm Hooper's theft conviction.

II: Jury Instruction Regarding Legal Surety

As part of its jury instructions, the trial court provided the following instruction regarding the law of sureties and the Bail Reform Act:

When a person is charged with a crime, that person is entitled to be released upon bond in most cases. A bail bond is an undertaking by the surety into whose custody the principal is placed, that he will produce the principal in court at a stated time and place.

The security may be cash, real estate, or a contractual promise to pay in the event the person charged does not appear in court. In the situation of a promise to pay, the person charged with a crime signs a promise to pay a designated amount if he fails to appear in court. In this role he is known as the principal. This promise to pay must then be secured by a surety or sureties. A surety is one who becomes legally liable for the debt, default, or failure of another.

In other words, if the principal does not pay, the surety must pay the obligation. A surety may be a professional bonding company approved by the Court, or a surety may be a private individual who is approved by the magistrate or officer. In the case of a private individual surety, the law requires two private sureties to sign a bond.

The bond itself is a contract between the State, the principal, and any surety or sureties. A party to a contract is presumed to have read the contract.

In this case, a bond form was signed as surety by defendant Daryl Hooper, but due to a legal defect, defendant Hooper was not a sufficient legal surety.

The trial court then gave instructions regarding the arrest conditions provided in Tennessee Code Annotated sections 40-11-132 and -133, which are discussed above.

The defendants argue that the trial court's instruction that Hooper was not a legal surety was a factual issue that should have been submitted to the jury, while the state argues that this instruction was an issue of law that was properly decided by the trial court. While the state correctly asserts that the instruction was an issue of law, our review of the jury instructions leads us to conclude that the trial court committed reversible error by reaching an incorrect conclusion of law regarding the Bail Reform Act and Hooper's surety status.

In criminal cases, a defendant has the right to a correct and complete charge of the law. State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000). The material elements of the charged offense should be described and defined in connection with that offense. State v. Ducker, 27 S.W.3d 889, 899 (Tenn. 2000); State v. Cravens, 764 S.W.2d 754, 756 (Tenn. 1989). The failure to do so deprives

the defendant of the constitutional right to a jury trial and subjects the erroneous jury instruction to harmless error analysis. Garrison, 40 S.W.3d at 433-34. Furthermore, pursuant to article six, section nine of the Tennessee Constitution, “[j]udges shall not charge juries with respect to matters of fact, but [they] may state the testimony and declare the law.” A jury instruction must be reviewed in its entirety and read as a whole rather than in isolation. State v. Leach, 148 S.W.3d 42, 58 (Tenn. 2004). “An instruction should be considered prejudicially erroneous only if the jury charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law.” State v. Faulkner, 154 S.W.3d 48, 58 (Tenn. 2005) (citing State v. Vann, 976 S.W.2d 93, 101 (Tenn. 1998)).

The defendants argue that the trial court’s jury instruction regarding Hooper’s surety status was an impermissible comment on the facts of the case. We disagree. “Both the interpretation of statutes and the interpretation of contracts are questions of law and, therefore, require a de novo review on appeal with no presumption of correctness given to the lower courts’ conclusions of law.” State ex rel. Pope v. U.S. Fire Ins. Co., 145 S.W.3d 529, 533 (Tenn. 2004). The Tennessee Supreme Court has also held that a surety’s statutory bond is a contract, and as such, courts should determine the intent of the parties to the bond in the same way in which courts would construe a contract. See Sherman v. Cate, 159 Tenn. 69, 16 S.W.2d 25, 25-26 (1929). Accordingly, the trial court in this case was obligated to review the victim’s bond, conclude as a matter of law whether Hooper was a surety, and instruct the jury accordingly.

However, upon our de novo review of the trial court’s conclusions of law regarding the victim’s bond and Hooper’s surety status, we conclude that the trial court’s finding that Hooper was not a surety was error. A provision of the Bail Reform Act states that “[n]o sureties are discharged by reason of . . . [t]he want of any of the qualifications required in this part” or the lack of “the requisite number of sureties.” Tenn. Code Ann. § 40-11-129(1)-(2) (2003). In applying the facts of this case to this statutory provision, although Hooper and ASAP Bonding signed Turner’s bond as sureties, and although Tennessee Code Annotated section 40-11-122(2) states that a bond entered into by private sureties must contain “at least two (2) sufficient sureties,” and that [s]ureties under this section shall not be a professional bondsmen or attorneys,” the deficiencies associated with Turner’s bond did not, contrary to the trial court’s statement, relieve Hooper of his surety status or his obligations as surety. Thus, the trial court’s jury instruction was erroneous and prejudicial, and as Hooper’s assertion that he was a surety formed the core of the defendants’ argument at trial, this error requires the defendants’ felony cases to be remanded for new trials.

Although our determination regarding this issue requires the defendants’ cases to be reversed and remanded, we will address the remainder of the defendants’ arguments so as not to pretermitt their remaining issues. See State v. Parris, 236 S.W.3d 173, 189 (Tenn. Crim. App. 2007) (following a similar procedure).

III: Jury Instruction Regarding Culpable Mental State

The defendants next contend that the trial court erred by giving the jury various definitions

of the term “knowingly” in its jury instructions, definitions that were, in the defendants’ view, inaccurate and confusing to the jury. The state asserts that the defendant has waived this issue by failing to provide sufficient argument and citations to the record.

This court examined culpable mental states in State v. Page, 81 S.W.3d 781 (Tenn. Crim. App. 2002). In Page, we noted that each mental state “is defined with reference to two or three of the following conduct elements: (1) the nature of defendant’s conduct, (2) circumstances surrounding the conduct, and (3) result of the defendant’s conduct.” Id. at 787 (citing Tenn. Code Ann. § 39-11-302). We also noted that “our code contemplates that the applicable conduct element (nature of conduct, circumstances surrounding the conduct, and result of the conduct) for a given culpable mental state . . . depends upon the offense.” Id. (citation omitted). While jury instructions that misstate the culpable mental state necessary for an offense are erroneous, “error with regard to the definition of the culpable mental state may qualify as harmless beyond a reasonable doubt where mens rea is not a disputed issue at trial.” State v. Guy, 165 S.W.3d 651, 660 (Tenn. Crim. App. 2004) (citation omitted).

Kidnapping Jury Instruction

The record establishes that in instructing the jury regarding the defendants’ kidnapping indictment, the trial court defined “knowingly” as follows:

Knowingly means that a person acts with an awareness that his conduct is reasonably certain to interfere with the victim’s liberty.

This definition of “knowingly” omitted the “nature of conduct” language established in our criminal code’s definition of the term. See generally Tenn. Code Ann. § 39-11-302(b) (“‘Knowing’ refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist.”). This omission is problematic because our court has defined the related offense of especially aggravated kidnapping as a nature of conduct offense:

[E]specially aggravated kidnapping is not a result of conduct offense. Especially aggravated kidnapping is established when the proof shows that the defendant knowingly removed or confined another unlawfully so as to interfere substantially with the other’s liberty . . . The word “knowingly” clearly modifies the words removed or confined. Thus, the State [is] required to show, and the court [is] required to instruct, that the defendant committed especially aggravated kidnapping if he removed or confined the victim and did so knowing that the removal or confinement was unlawful.

State v. Tracy F. Leonard, No. M2001-00368-CCA-R3-CD, 2002 WL 1987963, at *26 (Tenn. Crim. App. Aug. 28, 2002).

Thus, through its instructions, the trial court improperly defined kidnapping as a “result of conduct” offense, which improperly allowed the jury to convict the defendants without the state proving that the defendants knew that their conduct was illegal. Because the defendants’ mental state was a substantial basis for their defense, the trial court’s error in giving this jury instruction cannot be considered harmless beyond a reasonable doubt. Accordingly, the defendants’ kidnapping convictions are reversed and remanded for new trials.

Facilitation of Aggravated Burglary Jury Instruction

The trial court next instructed the jury regarding the offense of aggravated burglary, an offense for which both defendants were tried. In giving its instruction on this offense, the trial court defined “knowingly” as follows:

Knowingly means that a person acts with an awareness that his conduct is reasonably certain to cause the result.

In instructing the jury on the lesser included offenses of aggravated burglary, including facilitation of aggravated burglary, the trial court declined to define the term again, instead informing the jury that the term had been previously defined.

As was the case with its kidnapping instruction, the trial court’s definition of “knowingly” in its instructions on aggravated burglary and that offense’s lesser-included offenses omitted the “nature of conduct” language established in our criminal code’s definition of the term. Aggravated burglary and its lesser included offenses are criminal because of the circumstances surrounding entry of another’s residence with intent to commit a felony; the defendant must be aware that he is entering a dwelling that does not belong to him without the owner’s effective consent. Thus, we conclude that aggravated burglary and its lesser included offenses are nature of conduct offenses. Therefore, as was the case with the kidnapping jury instruction, the trial court’s error in failing to provide the nature of conduct definition of knowingly as part of its aggravated burglary instruction was error, and this error cannot be considered harmless because the defendants’ mens rea was at issue in the jury’s consideration of aggravated burglary and its lesser included offenses. The defendants’ convictions for facilitation of aggravated burglary are reversed and remanded for new trials.

Assault Jury Instruction

In instructing the jury as to the elements of aggravated assault, the offense for which Stump was tried, the trial court defined “knowingly” as follows:

Knowingly means that a person acts knowingly with respect to the conduct or the circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist.

A person acts knowingly with respect to . . . the result of the person’s conduct

when the person is aware that the conduct is reasonably certain to cause the result.

In instructing the jury on the lesser-included offense of assault, the trial court instructed the jury that the term “knowingly” had been previously defined.

In this instance, the trial court properly instructed the jury as to the definition of “knowingly.” This court recently affirmed a trial court’s use of a jury instruction for aggravated assault that used both “result of conduct” and “nature of conduct” definitions of “knowingly.” State v. Szumanski Stroud, No. W2006-01945-CCA-R3-CD, 2007 WL 3171158, at *5 (Tenn. Crim. App. Oct. 29, 2007) (concluding that the victim’s being placed in fear is a “result of conduct” element, while displaying a deadly weapon is a “nature of conduct” element), app. denied (Tenn. May 5, 2008). Although the trial court did not instruct the jury as to the definition of “knowingly” in its charge on the lesser included offense of assault, we conclude that the jury could have reasonably inferred that the trial court’s instruction referring to the definition of “knowingly” as previously defined referred to the definition as provided in the charge for aggravated assault and not the charge for the other offenses. Finding no error as to this jury instruction, we deny Stump relief.

Theft Jury Instruction

In instructing the jury on the elements of theft, an offense for which Hooper was tried, the trial court did not provide a definition of “knowingly.” Rather, it noted that it had previously defined the term, as the term had been thoroughly defined in the court’s instructions concerning kidnapping, aggravated burglary, and assault. This failure to provide a definition of the culpable mental state in conjunction with the theft jury instruction constituted error on the part of the trial court. However, this error was harmless. Hooper’s mental state was only at issue regarding those offenses (kidnapping and facilitation of aggravated burglary) where he believed he had the right to apprehend Turner pursuant to the Bail Reform Act. The theft of the shotgun was unrelated to Hooper’s stated purpose of removing himself from Turner’s bond, and therefore the defendant’s mental state was not at issue. This fact, coupled with the overwhelming evidence supporting Hooper’s conviction on this offense, leads us to conclude that the trial court’s error did not prejudice the defendant or affect the jury’s verdict. As such, we deny Hooper relief.

IV: Jury Instruction Regarding Definition of “Recklessly”

The defendants next argue that the trial court erred in the manner in which it instructed the jury as to the definition of “recklessly.” Throughout its jury instruction, the trial court noted that the term “recklessly” had been previously defined, when in fact the trial court did not define the term when it was initially mentioned in the jury instruction. Near the close of the jury instruction, the trial court acknowledged that it had not given the jury a definition of “recklessly,” and at that point it provided a definition of the term to the jury.

As the state indicates in its brief, although the defendants’ stated issue is that the trial court erred in failing to provide an accurate definition of the term “recklessly,” the defendants base their

argument regarding this issue on the order in which the trial court gave the instruction on the definition of “recklessly.” The defendants provide no citations to the appellate record or to legal authority to advance their assertion that the trial court erred by providing the definition of “recklessly” immediately before the jury retired for deliberations. The defendants’ actions fail to meet the requirements of Rule 27(a)(7) of the Tennessee Rules of Appellate Procedure, which requires the appellant’s brief to contain “[a]n argument . . . setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . relied on.” The rules of this court require “[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record” to be treated as waived. Tenn. Ct. Crim. App. R. 10(b). Accordingly, we conclude that the defendants have waived this issue on appeal.

V: Sentencing

The defendants’ last issue is that the trial court erred in sentencing them. The trial court sentenced Hooper as a Range II offender to eight years for kidnapping, six years for facilitation of aggravated burglary, and eleven months, twenty-nine days for theft. The sentences were ordered to run concurrently, resulting in an effective eight-year sentence. Stump was sentenced to four years for kidnapping, four years for facilitation of aggravated burglary, and eleven months, twenty-nine days for assault, resulting in an effective four-year sentence.

On appeal, the defendants assert that the trial court erred by imposing excessive sentences and refusing to impose alternative sentences. As the defendants’ felony convictions have been reversed and remanded for new trials, we will not review the lengths of the sentences for those offenses in great depth, and we will omit all discussion of the trial court’s denial of alternative sentencing for the defendants’ felony convictions.

Trial Court’s Use of Enhancement Factors

However, while we will not discuss the trial court’s felony sentencing in great length, we will address the Sixth Amendment concerns that were evident in the sentences imposed in this case. The defendants’ offenses were committed in November 2004. Accordingly, although the defendants were not tried until August 2006, after the July 2005 enactment of Tennessee’s revised sentencing act, the defendants would have been sentenced according to the sentencing guidelines effective at the time of their arrest unless they executed waivers of their ex post facto rights. See 2005 Tenn. Pub. Act ch. 353, § 18. No such waivers appear in the record, and at the sentencing hearing neither the judge nor the parties addressed the issue of which version of the sentencing act would be used. Therefore, the trial court should have applied the former sentencing act in imposing sentences.

At the sentencing hearing, the trial court noted the existence of the following enhancement factors as to Hooper:

- (3) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;
- (4) The offense involved more than one (1) victim; and
- (11) The defendant had no hesitation about committing a crime when the risk to human life was high

Tenn. Code Ann. § 40-35-114(3), (4), (11) (2003). As to Stump, in addition to factors (4) and (11), the trial court applied these factors:

- (2) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; and
- (14) The felony was committed while on [probation] . . . from a prior felony conviction.

Id. § (2), (14)(c).

The Tennessee Supreme Court recently held that the trial court's enhancement of a defendant's sentence based on factors that had not been found by a jury beyond a reasonable doubt (other than a defendant's record of prior convictions) violated a defendant's Sixth Amendment right to a jury trial as interpreted by the Supreme Court. State v. Gomez, 239 S.W.3d 733, 740-41 (Tenn. 2007) ("Gomez II") (citing Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856, 860 (2007)); See also Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000). Thus, the trial court's application of all enhancement factors to Hooper's sentence and all enhancement factors except history of criminal convictions to Stump's sentence was improper.

Misdemeanor Sentencing

On appeal, the defendants appear to confine their arguments regarding the length and manner of their sentences for their felony convictions. Additionally, we note that the trial court has a great deal of flexibility in imposing misdemeanor sentencing, see State v. Troutman, 979 S.W.2d 271, 273 (Tenn. 1998); State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997), and that a defendant convicted of a misdemeanor, unlike one convicted of a felony, is not entitled to a presumptive sentence, see State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). Accordingly, we affirm the trial court's imposed sentences of eleven months, twenty-nine days for Hooper's misdemeanor theft conviction and Stump's misdemeanor assault conviction. However, we note that in this case, the trial court did not set a percentage of the misdemeanor sentences that Hooper and Stump were to serve. The misdemeanor sentencing provisions require the trial court to set a percentage of the sentence that the defendant must serve before becoming eligible for certain release programs. Tenn. Code Ann. § 40-35-302(d). "If no percentage is expressed in the judgment, the percentage shall be considered zero percent (0%)." Id. Accordingly, we conclude that the misdemeanor sentences are to be served at zero percent.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgments of the trial court as to the defendants' convictions for kidnapping and facilitation of aggravated burglary are reversed and the cases are remanded to the Circuit Court for Humphreys County for new trials. The judgments as to Hooper's theft conviction and Stump's assault conviction are affirmed.

D. KELLY THOMAS, JR., JUDGE